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SUPREME COURT, U.S.

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 398

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF ALABAMA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

I

In our principal brief we argued (pp. 18–40) that the lower courts were in error in holding that the Civil Rights Act of 1957 does not permit suit against a state. Since the filing of that brief, the Civil Rights Act of 1960, amending the 1957 Act, has been passed by Congress and is now before the President. If enacted into law, it will conclusively settle the main statutory problem involved. While we believe that the 1957 Act in its unamended form authorized suits against a state—and this view is supported by the legislative history of the 1960 amendment—the latter would render unnecessary further consideration of the original 1957 Act, and respondents' contentions concerning it.

The 1960 legislation amends 42 U.S.C. 1971(c) by adding the following language:

> Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a), the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State.

This provision makes it perfectly plain that a state is a proper party defendant in a suit under Section 1971(c). Moreover, the legislative history of the 1960 amendment shows clearly that the purpose of the amendment was not to change existing law but merely to express what was deemed to be the law under the earlier statute. See Hearings before the Senate Committee on Rules and Administration, 86th Cong., 2d Sess., p. 338 (testimony of Attorney General Rogers);[1]

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[1] Attorney General Rogers. "* * * The bill has a second provision applicable to voting rights cases: It would provide that in any such case where State officials charged with the discrimination involved have resigned or have been relieved of their offices and no successors have taken their places, the case may be instituted or continued against the State itself.

"The purpose of this provision is merely precautionary because in a case now before the courts, the Department of Justice has taken the position that existing law permits such litigation."

Hearings before the House Committee on the Judiciary, 86th Cong., 2d Sess., p. 34 (testimony of Deputy Attorney General Walsh).[2] Thus, the new statute would remove any doubt as to the amenability of the state to suit under Section 1971(c).

The propriety of a disposition of this case on the basis of the 1960 amendment is clear. The injunction sought by the Government has not yet issued, and therefore any injunction which will issue will be prospective in character. Since injunction actions involve no problem of retroactivity, intervening statutory changes may be taken into account and the decision based on the state of the law at the time of judgment. *Ziffrin, Inc.* v. *United States*, 318 U.S. 73, 87; *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 464; *American Foundries* v. *Tri-City Council*, 257 U.S. 184, 201; *Hines* v. *Davidowitz*, 312 U.S. 52.[3]

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[2] "Mr. WALSH. There is a case now pending before the Supreme Court that deals with that problem in Alabama, *United States* v. *Alabama*. The practice where a State officer is the person who is responsible, or who is participating in this pattern or practice of discrimination, would be the practice of the Department of Justice to sue the State as one of the parties to the lawsuit. So the State would always be present as a party, and the attorney general of the State would be served with all the processes, as well as the State registrar.

"One of the provisions of this bill——

"Mr. WILLIS. The very last one.

"Mr. WALSH. Expressly gives that privilege, although we think that we already have that under existing law."

[3] Nor does it matter that the facts on which the injunction would be based occurred before the enactment of the new statute. See *Reynolds* v. *United States*, 292 U.S. 443, 449; *Cox* v. *Hart*, 260 U.S. 427, 435.

There is no need or justification for returning the case to the district court for consideration of the 1960 amendment. The 1960 amendment in terms authorizes suit against a state, and poses no factual or other problems within the peculiar competency of the district court. Cf. *Hines* v. *Davidowitz*, *supra*. The complaint in the instant case was filed on February 5, 1959, and still only the stage of preliminary motions has been reached. The rights involved are fundamental. To return the case to the district court for its consideration of the application of the 1960 amendment would serve no useful purpose and could cause further delay.

For these reasons, we urge that the Court dispose of this case by holding that, since the 1960 Act (upon enactment into law) clearly authorizes suit against the respondent state, the case should be remanded to the district court with directions to overrule the motion to dismiss the state as a party defendant.

II

The 1960 Act provides for the appointment of voting referees in implementation of a decree where a pattern or practice of racial discrimination has been found.[4] With this power available to the district court, there would appear to be no need at present for continuing to hold the individual respondents in the case if the state remains as a defendant in the case. Accordingly, if the Court should dispose of the case as proposed above, the Government would have no

[4] The pertinent portion of the Act is printed in the Appendix, pp. 6–10.

objection to the dismissal of respondents Rogers and Livingston as defendants.

Respectfully submitted.

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APRIL 1960.

APPENDIX

The Civil Rights Act of 1960 provides in pertinent part:

TITLE VI

SEC. 601. That section 2004 of the Revised Statutes (42 U.S.C. 1971), as amended by section 131 of the Civil Rights Act of 1957 (71 Stat. 637), is amended as follows:

(a) Add the following as subsection (e) and designate the present subsection (e) as subsection "(f)":

"In any proceeding instituted pursuant to subsection (c) in the event the court finds that any person has been deprived on account of race or color of any right or privilege secured by subsection (a), the court shall upon request of the Attorney General and after each party has been given notice and the opportunity to be heard make a finding whether such deprivation was or is pursuant to a pattern or practice. If the court finds such pattern or practice, any person of such race or color resident within the affected area shall, for one year and thereafter until the court subsequently finds that such pattern or practice has ceased, be entitled, upon his application therefor, to an order declaring him qualified to vote, upon proof that at any election or elections (1) he is qualified under State law to vote, and (2) he has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. Such order shall be effective as to any election held within the longest period for

which such applicant could have been registered or otherwise qualified under State law at which the applicant's qualifications would under State law entitle him to vote.

"Notwithstanding any inconsistent provision of State law or the action of any State officer or court, an applicant so declared qualified to vote shall be permitted to vote in any such election. The Attorney General shall cause to be transmitted certified copies of such order to the appropriate election officers. The refusal by any such officer with notice of such order to permit any person so declared qualified to vote to vote at an appropriate election shall constitute contempt of court.

"An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote.

"The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by Revised Statutes, section 1757; (5 U.S.C. 16) to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings as to whether or not at any election or elections (1) any such applicant is qualified under State law to vote, and (2) he has since the finding by the court heretofore specified been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. In a proceeding before a voting referee, the applicant shall be heard ex parte at such times and places as

the court shall direct. His statement under oath shall be prima facie evidence as to his age, residence, and his prior efforts to register or otherwise qualify to vote. Where proof of literacy or an understanding of other subjects is required by valid provisions of State law, the answer of the applicant, if written, shall be included in such report to the court; if oral, it shall be taken down stenographically and a transcription included in such report to the court.

"Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an order to show cause within ten days, or such shorter time as the court may fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties a statement of exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an appropriate memorandum of law. The issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A hearing as to an issue of fact shall be held only in the event that the proof in support of the exception disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the

basis of answers included in the report of the voting referee.

"The court, or at its direction the voting referee, shall issue to each applicant so declared qualified a certificate identifying the holder thereof as a person so qualified.

"Any voting referee appointed by the court pursuant to this subsection shall to the extent not inconsistent herewith have all the powers conferred upon a master by rule 53(c) of the Federal Rules of Civil Procedure. The compensation to be allowed to any persons appointed by the court pursuant to this subsection shall be fixed by the court and shall be payable by the United States.

"Applications pursuant to this subsection shall be determined expeditiously. In the case of any application filed twenty or more days prior to an election which is undetermined by the time of such election, the court shall issue an order authorizing the applicant to vote provisionally: *Provided, however,* That such applicant shall be qualified to vote under State law. In the case of an application filed within twenty days prior to an election, the court, in its discretion, may make such an order. In either case the order shall make appropriate provision for the impounding of the applicant's ballot pending determination of the application. The court may take any other action, and may authorize such referee or such other person as it may designate to take any other action, appropriate or necessary to carry out the provisions of this subsection and to enforce its decrees. This subsection shall in no way be construed as a limitation upon the existing powers of the court.

"When used in the subsection, the word 'vote' includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having

such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election; the words 'affected area' shall mean any subdivision of the State in which the laws of the State relating to voting are or have been to any extent administered by a person found in the proceeding to have violated subsection (a); and the words 'qualified under State law' shall mean qualified according to the laws, customs, or usages of the State, and shall not, in any event, imply qualifications more stringent than those used by the persons found in the proceeding to have violated subsection (a) in qualifying persons other than those of the race or color against which the pattern or practice of discrimination was found to exist."

(b) Add the following sentence at the end of subsection (c):

"Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a), the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State."

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